Nos. 135, 136 & 138.
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JAMES H. McKENNEY

Brief of Whalley & Muir for Appellants

Supreme Court of the United States

Filed Oct. 16, 1897.

OCTOBER TERM, 1897.

THE STEAM TUG "RESOLUTE," A. B. HAMMOND, and E. L. BONNER,
Claimants and Appellants.
vs.
HENRY E. WILSON, SIDNEY G. WOLFKILL, THOMAS NELSON & CHARLES JAHN,
Libellants and Respondents.
No. 16,200

THE STEAM TUG "RESOLUTE," A. B. HAMMOND and E. L. BONNER,
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GEORGE DOWSETT,
Libellant and Respondent.
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THE STEAMER "THREE SISTERS," THE OREGON CENTRAL AND EASTERN RAILROAD COMPANY,
Claimants and Appellants.
vs.
R. J. YOUNG, M. BELL, C. A. BELL, H. ROBERTSON, W. HOWELL, W. H. SUTTON, *et al.*,
Libellants and Respondents.
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Appeal from the District Court of the United States for the District of Oregon.

BRIEF FOR APPELLANTS.

JOHN W. WHALLEY and
WILLIAM T. MUIR,
Proctors for Claimants.

WILLIAM T. MUIR,
Of Proctor for Claimants.

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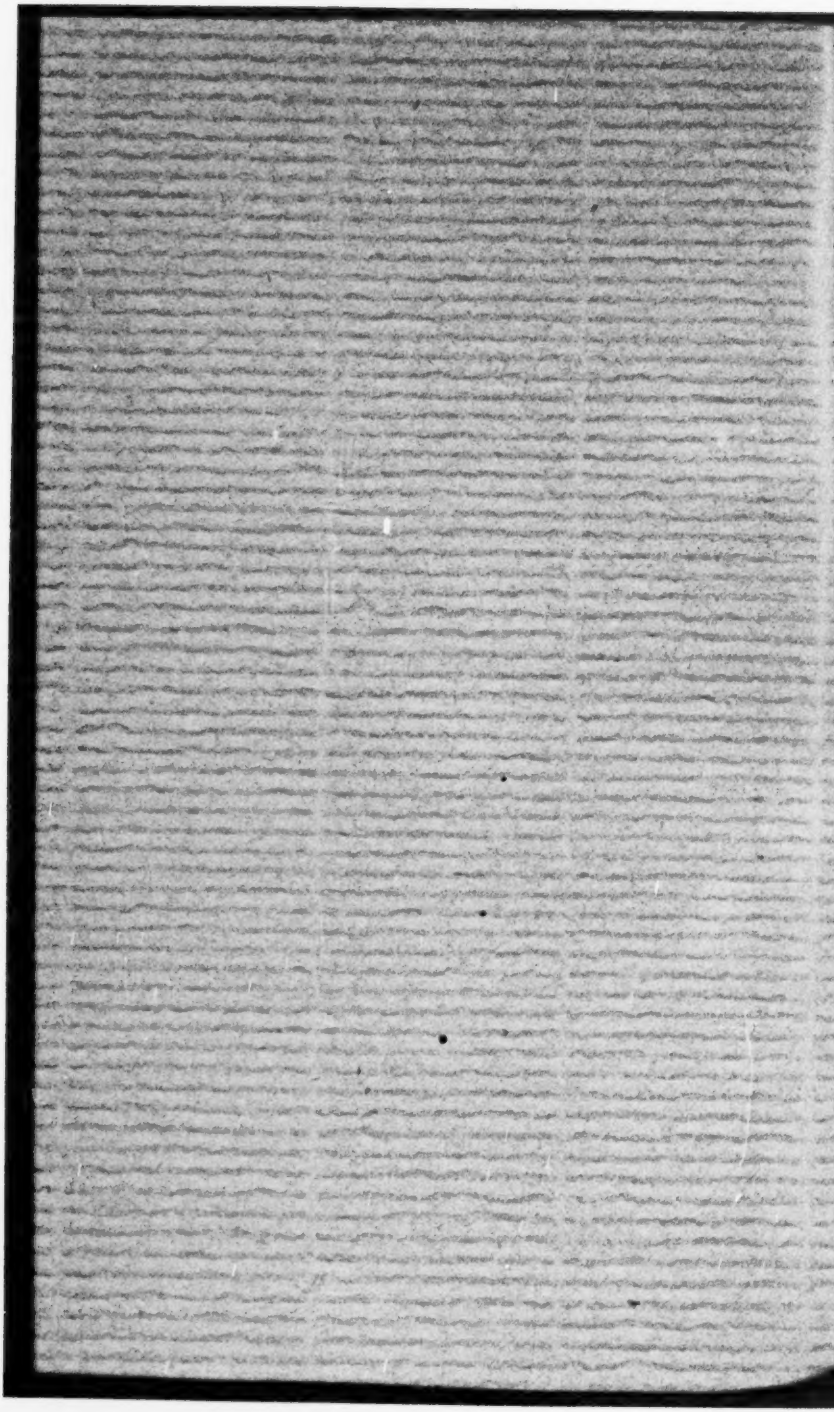

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STATEMENT OF THE CASE.

The principal questions to be decided being common to all of these cases, a stipulation has been entered into between the parties consenting to a consolidation.

The Oregon Pacific Railroad Company was an Oregon corporation engaged in operating a railroad in said state, and incidental thereto, a steamship line between its seaboard terminus, Yaquina Bay, Oregon, and San Francisco, California, and a line of steamboats on the Willamette river. The steam tug Resolute was employed on Yaquina Bay, in local aid of the ocean navigation of the company, and the steamboat Three Sisters was engaged in river service on the Willamette. Early in its history the Oregon Pacific Railroad Company executed a mortgage upon all of its property, including the libeled vessels, to the Farmers Loan & Trust Company, of New York, trustee, to secure the payment of a large sum of borrowed money. Default was made in the payment of the principal and interest of this mortgage indebtedness. The trustee brought suit in the Circuit Court of the State of Oregon for Benton county, to foreclose the mortgage, and for the appointment of a receiver *pendente lite*. A receiver was appointed in the proceedings thus instituted, and, pending the final determination thereof, he was authorized to continue the operation of the railway, steamship and steamboat lines. The libellants, Henry E. Wilson, Sydney G. Wolfkill, Thomas Nelson and Charles Jahn, were employed, by the said receiver, as seamen on the tug Resolute. They commenced said service on or about Janu-

ary 1, 1892, and continued therein until about December 17, 1893, at which time they were dismissed. In the meantime their wages were not fully paid. At the time of their discharge, the several amounts mentioned in the amended libel were due them from the receiver. Geo. Dowsett, the libellant of the Resolute, in one of the cases, claims for services personally rendered, and also under an assignment from one Tellef Telleffsen. Both Dowsett and his assignor, Telleffsen, were employed by the receiver.

The libellants of the Three Sisters were employed in various capacities, on the boat named. Their employment began and ended during the administration of the receivership. Libellants R. J. Young and Geo. Raabe each acted as captain of the Three Sisters; Raabe acted a part of the time as captain and watchman at a uniform salary. It is shown that this boat was engaged in river traffic within the State of Oregon, and that the duties of the master were confined to the navigation of the vessel. The boat carried a purser, whose business it was to receive and pay out all moneys, and it plied only between points where there were regularly employed agents of the receiver. The libel against the last-named vessel was not filed until after the expiration of one year from the time the amounts claimed became due. *The amended libels all show that on or about December 22, 1894, all of the property of the Oregon Pacific Railroad Company, including the vessels named, was sold in the original foreclosure proceedings, under the final decree of the circuit court*

in which the suit was pending. The claimants became the purchasers.

Record Three Sisters, pp. 33, 34.

Record Dowsett, p. 36.

Record Wilson, p. 29.

The amended libel against the Three Sisters contains the following averment: "That until or about December 22, 1894, the said steamer Three Sisters remained in the control and possession of the receivers so appointed as aforesaid by the said Circuit Court of the State of Oregon for the County of Benton. That the said suit of the Farmers Loan & Trust Company against the Oregon Pacific Railroad Company and the Willamette Valley & Coast Railroad Company was brought for the purpose of foreclosing a mortgage or deed of trust conveyed to the said Farmers Loan & Trust Company of the entire property of the said Oregon Pacific Railroad Company for the purpose of securing an issue of bonds made by the said Oregon Pacific Railroad Company; and that the said receivers so appointed as aforesaid were appointed for the purpose of operating said railroad and steamboat lines of the said Oregon Pacific Railroad Company, including the said steamer Three Sisters pending the foreclosure of the said mortgage or deed of trust, and were so appointed at the instance of the said Farmers Loan & Trust Company, trustee as aforesaid. That on or about the said December 22, 1894, all of the property of the said Oregon Pacific Railroad Company, including the

said steamer Three Sisters, was sold under execution issued out of the said Circuit Court of the State of Oregon for the County of Benton in the said suit of the Farmers Loan & Trust Company, trustee, vs. The Oregon Pacific Railroad Company, and the Willamette Valley & Coast Railroad Company, and that all of the said property of the said Oregon Pacific Railroad Company, including the said steamer Three Sisters, was purchased at the said sale by one A. B. Hammond and E. L. Bonner, and that since said date the said steamer Three Sisters has been in the possession of the said Bonner and of the said Hammond, and is now in their possession as purchasers under the said sale as aforesaid."

Record Three Sisters, pp. 33, 34.

This sale was confirmed, and subsequently approved by the Supreme Court. (*Farmers Loan Company v. Oregon Pacific Railroad Company, 28 Or. 44.*) *The receiver was thereupon discharged.* At the time of sale notice was given of libellants' claims.

The claimants filed exceptions to the amended libel against the Resolute upon the following grounds:

"1st. That the same shows that at the time the said libellants and each of them, were employed, the said steam tug Resolute was in charge of and being operated by a receiver of the Oregon Pacific Railroad Company, a corporation, the owner of said steam tug, said receiver having been duly appointed by the Circuit

Court of the State of Oregon for Benton county, and that all of the services performed by said libellants and each of them, mentioned in said amended libel, were performed while said steam tug was in the possession of and being operated by said receiver, and that no maritime or other lien arose by reason of such employment, or the rendition of said services.

"2d. That the said libel shows that this court has no jurisdiction in the premises."

Record Wilson v. Resolute, p. 31.

Record Dowsett v. Resolute, p. 37.

The same exceptions were filed to the amended libel in the case against the Three Sisters. Exceptions were also filed to the last-mentioned amended libel on the additional ground that Young and Raabe were masters of the vessel, and that no lien arose in their favor; and on the further ground that Young and Raabe did not file their libels until after the expiration of one year from the rendition of the services.

Record Three Sisters, p. 35.

The court below overruled all of the exceptions, and, upon failure of the claimants to further plead, rendered judgment in favor of the libellants for the amounts claimed. (69 Fed. 742.)

Upon the entry of judgment the claimants perfected an appeal to this court. The appeal in each of the cases is similar in form. The following is a copy of the one

filed in Wilson et al. v. The Resolute: "The above-named claimants . . . conceiving themselves aggrieved by the final judgment entered herein on October 5, 1895, in the above-entitled proceedings, do hereby appeal from said final judgment to the Supreme Court of the United States, and they pray that this their appeal may be allowed, and that the question of the jurisdiction of the above-entitled court to render the said judgment be certified to the Supreme Court of the United States, and that a transcript of the record, and proceedings, and papers, upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States."

Record Wilson, p. 22.

Record Dowsett, p. 27.

Record Three Sisters, p. 24.

The allowance of the appeal in the Wilson case, the others being similar, is as follows:

"Be it remembered that on this day in the above-entitled cause came Wm. T. Muir, of proctors for claimants, and filed herein his assignment of errors, and petition for an allowance of an appeal herein to the Supreme Court of the United States, from the decree herein, rendered on the 5th day of October, A. D. 1895, which decree is as follows, to wit: (Here follows a copy of the decree.) And in open court the said claimants, by their said proctor, prayed that said appeal be allowed, and tendered a bond with sufficient surety, to the approval of the court, and which bond is hereby ap-

proved, to stay proceedings herein until said appeal shall have been determined, and thereupon the court hereby allows said appeal, and approves said bond, and execution is hereby stayed until the determination of said appeal. And this court does hereby certify and make known unto the Supreme Court of the United States that the only question arising upon the said appeal is the question as to whether or not, under the facts stated in the amended libel, and the exceptions thereto, this court acquired or had jurisdiction to hear or pronounce the said decree.

"And that the following is a copy of the said amended libel and the exceptions thereto."

(Here follows a copy of the amended libel and of the exceptions.)

Record Wilson, pp. 25-31.

Record Dowsett, pp. 30-37.

Record Three Sisters, pp. 27-35.

In the case last mentioned the following assignment of errors was filed:

"Now come the said E. L. Bonner and A. B. Hammond, and having appealed from the final judgment and decree of the District Court of the United States for the District of Oregon, to the Supreme Court of the United States in the above-entitled cause of contract, civil and maritime, assign the following as the errors on which they intend to rely on said appeal:

"First. The District Court of the United States for the District of Oregon erred in overruling the exceptions and each of them to the amended libel.

"Second. The District Court of the United States for the District of Oregon erred in holding that the performance of the services, or any of them, mentioned in the amended libel, gave rise to a maritime lien.

"Third. The District Court of the United States for the District of Oregon erred in holding that the libellants, and each of them, were entitled to and had a maritime lien on the said steam tug Resolute, for the sums due on account of the services mentioned in the amended libel.

"Fourth. The District Court of the United States for the District of Oregon erred in adjudging and decreeing that the said steam tug Resolute be sold in said proceedings to satisfy the said claims of said libellants.

"Fifth. The District Court of the United States for the District of Oregon erred in holding that the said court had jurisdiction in the said proceedings as to the claims of any of the said libellants."

Record Wilson, p. 23.

Record Dowsett, p. 28.

Record Three Sisters, p. 25.

In the case against the Three Sisters there is another assignment of error in addition to those quoted above, filed in the Wilson case. It is as follows:

"Sixth. The said District Court of the United States for the District of Oregon erred in holding that libellants R. J. Young and Geo. Raabe had acquired a lien upon the said steamer . . . on account of the services rendered by them respectively as master, and erred in holding that the rights of said R. J. Young and Geo. Raabe, as master, had not been barred by the statute of limitations."

Record Three Sisters, p. 25.

All of the libellants except R. J. Young and Geo. Raabe claim to be entitled to a lien under the general rules of admiralty. Young and Raabe, having each served in the capacity of master, rely upon the state law. The statute reads as follows:

"Sec. 3690. Every boat or vessel used in navigating the waters of this state or constructed in this state shall be liable and subject to a lien—

"1. For wages due to persons employed for work done or services rendered on board of such boat or vessel."

2 Hill's Code (1887), p. 1599.

"Sec. 3706. All actions against a boat or vessel under the provisions of this title shall be commenced

within one year after the cause of action shall have accrued."

2 Hill's Code (1887), p. 1602.

The cases were appealed on jurisdictional questions only. There are four of these. We claim—

. First. That the incidents of a receiver's contract attached to the contracts of employment, and no admiralty liens arose therefrom.

Second. *Regardless of the decision of this point, we contend that the matters have been thoroughly and finally determined by the decree of the court of equity, and cannot be re-examined in any court.*

Third. That the amended libels show that the statute of limitations has barred those claims which are based on the Oregon statutes.

Fourth. That the claim assigned was, by reason of the assignment, divested of an admiralty lien, and, in consequence, a court of admiralty has no jurisdiction to enforce its payment by a proceeding *in rem*.

ARGUMENT.

I.

These appeals were taken to this court from the final judgment of the United States District Court for the District of Oregon, under section 5 of the act of Congress of 1891. This section reads as follows, to wit:

"That appeals or writs of error may be taken from the district court, or from the existing circuit courts to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision" . . .

Supplement to Rev. Stats. 1874-1891, p. 903.

The proceedings were instituted by the former employes of a receiver, appointed by a court of equity in a foreclosure suit, to recover the amounts earned by them while in the receiver's employ. The employment of the men in the several occupations alleged; the rendition of services by them; the amounts remaining unpaid, and all other well-pleaded allegations of the amended libels, are admitted. The only questions argued in the lower court, and the only ones raised on these appeals, are jurisdictional. The proceedings are *in rem*. Admiralty has no jurisdiction *in rem* to enforce a demand for a seaman's wages, or other obligation arising *ex contractu*, unless the person instituting the proceedings is entitled

to a maritime lien at the time the proceedings are brought. If, then, we are right in our first contention, that no maritime or other lien can arise out of a receiver's contract, admiralty has no jurisdiction *in rem* to enforce payment of the several sums due libellants. If it is held that a maritime lien does attach as an incident to a receiver's contract, and is further held that the final decree of the court of equity in this case, and the sale of the libeled vessels and other property thereunder, is a complete adjudication of the rights of the libellants, and one which cannot be set aside, or reviewed in admiralty, the lower court had no power to render judgment in these cases. Whatever may be the conclusion of this court as to the correctness of our views, the *questions* for settlement are jurisdictional. The determination of these questions necessarily involves a consideration of the facts alleged in the amended libels. A determination of any legal question depends upon the facts existing in the particular case. Of course no attempt is made to doubt the general jurisdiction of the district court over admiralty causes. We claim in the first instance that while these cases are connected with the navigation of boats, they are, nevertheless, of a class not cognizable in admiralty. There are many such cases. Some of them are noted later in this brief. The mere fact that the subject-matter of litigation arises out of the operation of a boat does not give admiralty jurisdiction *in rem*. There are well-recognized exceptions. For instance, a master of a vessel under the general law has no lien. Neither has a person furnishing supplies in the home port. And it is

held that a mortgage given upon a vessel as security for a loan of money, not advanced for the purposes of a voyage, cannot be enforced in admiralty. The John Jay, 17 How. 399. The principal points presented are new. We claim they furnish another instance in which admiralty gives no lien. If we are right in our contention, the lower court did not have jurisdiction. If we are wrong, it did have.

It is held in Taylor v. Carryl, 20 How. 583, that "where a vessel has been seized under a process of attachment in a state court, and is in the actual custody of the sheriff, no valid seizure can be made of her so as to give *jurisdiction* in proceedings *in rem* in the District Court of the United States sitting in admiralty." And in Shields v. Coleman, 157 U. S. 168, 169, it was held by this court that "a Circuit Court of the United States has not the *power* to appoint a receiver of property already in the possession of a receiver duly and previously appointed by a state court." The question in the cases just quoted was whether a federal court could acquire jurisdiction over property *while* in the custody of a state court. The controlling question in the cases at bar is whether a federal court, sitting in admiralty, can acquire jurisdiction *in rem* over certain property, situated as previously herein explained, *after* the custody of the state court is relinquished.

As before noted, there are two other questions incidentally raised. Libellants Young and Raabe claim under the state statute. Our contention is that, at-

tached to the right to a lien given by the state statute is a condition that proceedings must be commenced to enforce the lien within one year after the cause of action arose. The amended libels show, as to the two libellants mentioned, that the causes of action in their favor accrued more than one year prior to the filing of the libels. If we are right in our contention, this also raises a question of jurisdiction. The life of the lien given by the statute is limited to one year after the cause of action arises. If no proper proceedings are instituted within the time designated, the lien is lost. If the lien has expired by limitation, no proceeding *in rem* can be brought to enforce it. The parties are relegated to whatever remedy the law may afford them *in personam*. Admiralty has no power to enforce a lien, by a proceeding *in rem*, which does not exist at the time its jurisdiction is invoked. And so with the remaining question hereinbefore noted. If it is true, as we contend, that the lien given a mariner is a personal privilege, and therefore incapable of assignment, the court had no jurisdiction *in rem* to enforce the claim of Geo. Dowsett acquired by him by assignment from Tellef Telleffsen. The reason is clear. The court had no jurisdiction to enforce a lien, because there was no lien to enforce. The existence of a lien is the life of a proceeding *in rem*. If there was no lien originally, or, being one, if it has been lost, the remedy cannot be invoked. Nothing remains but a personal right of action.

It will be shown hereafter that the decisions of the

federal courts upon the last two questions are conflicting. We submit to the court that these questions, in the interest of harmony of decision, should be finally determined here.

The lower court has certified that these appeals are taken solely on the questions of jurisdiction arising out of the facts shown by the record now in this court. We think we are at liberty to argue any jurisdictional question so appearing. If we are mistaken in supposing the last two questions are jurisdictional, the appeal cannot be affected by the error. The arguments will not be considered.

As we apprehend it, under the judiciary act of 1891, the test of a right to an appeal to this court from a Circuit or District Court of the United States, is the *question* to be reviewed. If it is purely a jurisdictional one the appeal lies exclusively to this court.

Smith v. McKay, 161 U. S. 355, 357.

Shields v. Coleman, 157 U. S. 168, 177.

In re Lehigh Mining & Mfg. Co., 156 U. S. 322.

United States v. Jahn, 155 U. S. 109.

McLish v. Roff, 141 U. S. 661, 667, 668.

The circuit court of appeals for this circuit has held it has no jurisdiction to entertain such an appeal.

Allen v. Strong, 70 Fed. 273.

Barling v. Blank, 50 Fed. 260.

United States v. Sutton, 47 Fed. 129.

All of these cases were tried upon exceptions to the amended libels. The court below, as shown in the earlier pages of this brief, certified the decree, the amended libels and the amended exceptions to this court. As we understand, the rule requiring the lower court to certify the question to be reviewed was made in the interest of brevity. The question to be determined respecting the jurisdiction might frequently arise during the course of the taking of testimony, or might otherwise be disguised in a long record, a large portion of which would be unnecessary to the decision, and would but embarrass the court in arriving at the true point for settlement. In these cases the questions arise upon the amended libels and the exceptions. It was considered that a certification of the short record, together with the appeal on the question of jurisdiction, and the certificate of the court that the appeal is taken solely upon that ground, would present the matter as clearly and with as much brevity as it could be presented in any other form. It was also considered that it is necessary to fully understand all of the allegations of the amended libels in order to thoroughly comprehend the questions raised. The portions of the record certified to by the court fully explain all the facts necessary to be considered here.

Record Three Sisters, pp. 27-35.

Record Dowsett, pp. 30-37.

Record Wilson, pp. 25-31.

The clerk of the court, we notice from the printed record, has certified, in addition to the papers last referred to, the other documents filed in the cause. These, with the exception of the petition for appeal, supersedeas bond and assignment of errors, are unnecessary to be considered.

In Shields v. Coleman, 157 U. S. 168-9, this court says: "The court below, in its order granting the appeal, said: 'This appeal is granted solely upon the question of jurisdiction'; and made further provisions for *determining what part of the record* should be *certified* to this court under the appeal, under which it subsequently *directed the portions of the record to be certified* to this court, and the record was prepared accordingly. Held, that this was a sufficient *certificate* of a question of jurisdiction under the provisions of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, 827."

To the same effect is Smith v. McKay, 161 U. S. 355, 357.

It would seem that the method adopted here has received the direct sanction of this court.

The claimants filed exceptions to the rulings of the lower court. These exceptions are broad enough to cover all the points made in this brief. When the questions raised go to the jurisdiction of the court and appear upon the face of the proceedings, it would

seem unnecessary to file exceptions. This is especially true under the liberal practice in admiralty. . . . "When the want of jurisdiction is apparent on the face of the libel, there can be no doubt of the admissibility and substantial propriety of a simple demurrer. . . . And indeed it matters not in what mode, however informal, in such cases, the fact of a defect of jurisdiction is brought to the notice of the court; for in whatever manner it may be done the court will, of course, thenceforth desist from all further cognizance of the cause, or, in the language of the English High Court of Admiralty, will 'prohibit itself.' "

The Bee, Wares R. 332.

2 Conkling's U. S. Admiralty (2d Ed. Rev.), p. 229.

It will be observed that the exceptions filed to the amended libels do not specifically direct attention to the point to be extensively dwelt upon here, that the final decree of the court of equity renders the subject matter of the present litigation *res judicata*, although this point is involved in the general and particular exceptions expressly noted. All of the facts necessary to form a basis for this argument appear upon the face of the amended libels.

The syllabus of the case of The Maggie Hammond, 9 Wall. 435, reads: "Where a libel was filed against a foreign ship in an admiralty case, in an admiralty court of the United States, the libellant and claimant both being foreigners, the place of shipping and the place of

consignment being foreign ports, and the whole ground of libel a matter which occurred abroad, this court considered the question of jurisdiction open for argument here, though it was not raised by the pleadings, and had not been suggested by any one in the court below." And on page 449 of the decision the court says: "Aside from the merits of the controversy they also contend that the district court had no jurisdiction of the case; and as that is a preliminary question, it will be first considered before examining the questions more immediately involved in the pleadings. No such question is directly presented in the pleadings, and none such was raised in the court below, still, the better opinion is that the question is open to the appellants as it substantially appears that the home port of the ship is Yarmouth, Nova Scotia, and that both the libellants and claimant are foreigners."

II.

Under the general maritime law an employe on board a vessel engaged in navigation is entitled to a lien upon the vessel for sums due him and arising out of his employment. This lien he may enforce in an admiralty court by a proceeding *in rem*. And it is provided in Sec. 4535 of the Revised Statutes that "No seaman shall by any agreement other than is provided by this title, *forfeit his lien upon the ship*, or be deprived of any remedy for the recovery of his wages to which *he would otherwise have been entitled*, and every stipulation in any agreement inconsistent with any provision of this title,

and every stipulation by which any seaman consents to abandon his right to his wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative." Notwithstanding the general admiralty rule, and notwithstanding the federal statutes, every maritime contract and every maritime service does not give rise to a maritime lien enforceable against the ship by an action *in rem* through the medium of a court of admiralty. "To sustain a maritime lien, there must be in all *cases, either in fact or by presumption of law, a credit of the ship; and when such credit is negatived by the evidence, no such lien, whether maritime or statutory, will be recognized.*"

The Advance, 60 Fed Rep. 766, 767.

The Samuel Marshall, 4 C. C. A. 385.

Id. 54 Fed. Rep. 396, 403.

The Sirocco, 7 Fed. Rep. 599.

The Erastina, 50 Fed. Rep. 126.

Beinecke v. Secret, 3 Fed. 665, 667.

Consolidated Coal Co. v. The Secret, 6 Fed. Cases, 338.

Scott v. Failes, 5 Benedict, 82.

A lien upon a vessel for personal services and the consequent right to proceed against it *in rem*, under the forms of the practice in admiralty, is based upon either a presumption of law or fact, that the person seeking the remedy performed the services upon the credit of

the ship, and not upon the personal responsibility of the owner, or those in charge. A reference to the cases above cited will show that this principle has been applied in various instances, to wit: towage, supplies and wharfage, wages, and coal delivered to a *foreign* vessel. In some cases, and under some circumstances, the attendant presumption is against, and in others is in favor of the lien. This idea is coeval with admiralty jurisprudence. It found a ready application in the case of supplies furnished a vessel in the home port. It has never been ignored, but, on the contrary, has been broadened and extended as new circumstances occurred and new conditions arose. In this respect the common law finds an analogy in the rules of admiralty. The cases show that the presumption of law is sometimes conclusive in favor of the lien, and sometimes conclusive against it. One of the decisions cited above (7 Fed. Rep. 599) is an authority for the statement that the presumption in favor of the lien is sometimes rebuttable. So far as we know, the first question to be examined is new. It has never been determined by a court of admiralty—certainly not by this court. In the application of an old rule to new facts, particular attention will be given to the reason of the rule. The reason itself must be applied, and the rule must follow upon the reason. The first inquiry is, Did the libellants, as a matter of law or fact, render these services upon the *credit of the vessels*, or were the services performed upon the credit of the court of equity in charge of the property, and upon the credit of the ordinary rules of equity, giving the persons who are employed by the

court a first right to the earnings of the property under the control of the court; a first equitable lien upon the *corpus* of the property, and a right, if necessary, to the entire proceeds thereof upon judicial sale? Whatever may be the true answer to this question, there is yet another one present in all the cases at bar, and applicable alike to the claim of each of the libellants. The amended libels show that the property in the hands of the receiver, including the railway, steamship and steamboat lines, as well as all franchises of the defendant company, the Oregon Pacific Railroad, was sold by the receiver. The money thus received was applied, as in equity it must be applied, first, to the payment of the claims outstanding against the receivership, and incurred by the receiver for labor and supplies. It is apparent that the money derived from the sale of the entire property of the railroad, its franchises and all, was insufficient to pay these claims for labor in full. *Can these libellants, after all of this property, including the vessels libeled, has been sold for their benefit in a judicial proceeding, and after they have received their pro rata of the proceeds therefrom, calculated according to the established rules of the court of equity directing and conducting the sale, invoke the aid of a court of admiralty, and cause a resale of the identical property?*

Section 4535 of the Revised Statutes, above quoted, does not aid either party to this controversy. The question here is not whether a seaman has attempted to relinquish a "remedy for the recovery of his wages to

which he would otherwise have been entitled." Nor is it a question whether a seaman is attempting to "forfeit his lien upon the ship." The genuine question is whether the libellants were ever entitled to a lien, or to the remedy invoked. As we read the section noted, it does not assume to establish a rule of admiralty. It does not extend the seaman's right to a lien. It merely declares that any contract made with the view of abridging his rights or remedies, as then recognized by the settled practice of admiralty, shall be void. It gives no new right, no new lien, no new remedy. It prevents the bargaining away of those existing.

In the case of the Three Sisters the amended libel alleges that the boat was engaged in traffic on the Willamette river only between points where there were regularly employed agents of the receiver; that the duties of the captain thereon were only such as pertained to a pilot; that the boat carried a purser whose duty it was to sell tickets and to receipt for and see to the delivery of freight at the various points where agencies were established; that the captain had nothing whatever to do with the equipment or supply of the boat, nor the employment of the various persons occupied thereon. These averments state the facts as they existed and are admitted. They were made for the purposes of showing that the *reasons* which forbid a master having a lien in admiralty were absent here. And they supply reasons why an employe on board should not have a lien although ordinarily entitled thereto. In the cases against the Resolute, this state of facts does not

so plainly appear. It is shown, however, that the last-named vessel was employed locally on the bar at Yaquina Bay. It may, therefore, be fairly assumed that the facts are substantially the same.

It is apparent, then, at the very outset, that these cases differ from the ordinary ones in admiralty. The men on board were employed by a receiver, and were subject only to him. So far as their relations towards each other were concerned, they were in their nature independent. The power to employ, and the power to discharge was exercised by the receiver.

When this property was placed in the hands of a receiver, it was at once put under the government of a court of equity. The rules of equity applicable are well understood. All employes of the court, whether serving as brakemen or sailors, were bound to take knowledge of these rules. The receiver could not give employment to any one in any manner unauthorized by the law of receiverships. The persons employed were compelled, by the force of the law itself, to accept the employment upon the terms and under the conditions imposed by the rules of equity. These rules make no distinction between a manager, a sailor, or a day laborer. In the matter of their right to payment, in the time of payment, and the sources from which they were to receive their compensation, they all stood upon an equality. The same remedies were open to all alike. Equity knows no favor. Equality is equity. One of

the settled rules of equity is that property in the custody of a receiver is in the custody of the law.

Wiswall v. Sampson, 55 U. S. 64.

McNulta v. Lochridge, 141 U. S. 327, 332.

Another settled rule is that those who contract with a receiver must *look to the trust property and its proceeds for compensation.*

Barton v. Barbour, 104 U. S. 126, 130.

Turner v. Peoria & S. R. R. Co., 95 Ill. 134-5.

Vanderbilt v. Central R. R. Co., 43 N. J. Equity, 669, 670.

In Turner v. Railroad, 95 Ill. 135, the court, referring to receiver's certificates, says: "Whether they are *payable in full* or only *pro rata* depends on *the fact of the sufficiency of the fund under the control of the court.* Again, there is no personal liability on any one for their payment. Only the fund which the court controls is bound, and that only when it is equitable to charge it with the payment of the money evidenced thereby. Their payment can only be coerced by the application of the court having control of the trust property for an order upon its acting officer."

It is the duty of a court appointing a receiver to pay the debts of the receivership out of all moneys coming into the receiver's hands, either from the operation of

the road, or the sale of the *corpus* of the property. And the debts contracted for necessary operating expenses are, in equity, a lien on the property, prior to the lien of the mortgage. One of the purposes of the sale of the property by the court of equity is to pay these liens.

Kneeland v. American L. & T. Co., 136 U. S. 89.

Kneeland v. Bass Foundry, etc., 140 U. S. 592.

Bellingham Bay Imp. Co. v. Fairhaven, etc., Ry. Co., 49 Pac. Rep. 514.

What, then, is the presumption of law arising from these contracts for personal services? Is it to be held that the employes of a court of equity must look to the rules of equity for protection, or is it to be held that they, or some of them, may look to a court of admiralty for the enforcement of the contracts made with the equity court? Does the employment of a deck hand on a river boat destroy the rule of equity that those dealing with such a court must look to the trust property for compensation? It was argued in the lower court, with success, that, under the general maritime law, a seaman has a lien for his wages regardless of all conditions and circumstances of his employment or service; that the maritime law in this respect subordinates every other rule of law; destroys the principles of equity jurisprudence, and pays no heed to the exercised jurisdiction of a court of competent authority. It was contended further, that the final decree of a court of equity does not conclude even the employes of

that court; that among the employes of the equity court there are certain ones entitled to the protection afforded by admiralty, and these must be favored to the distinct pecuniary detriment of all others of their fellow employes. In our judgment these arguments are based upon two palpable and fundamental errors: First. They do not appreciate or contemplate the fact that, in some circumstances, under the general maritime law, the rendition of services as a seaman gives rise to no lien. Second. They fail to recognize the character of receiver's contracts, and the power and authority which a court of competent jurisdiction may exercise when it has complete control of a particular subject-matter in litigation, and of the binding and conclusive force of its final orders and decrees, regardless of whatever remedies might have been given, in the absence of a complete adjudication, in some other court of equal but different jurisdiction. As hereinbefore shown, it is not true that every maritime employment carries with it the right to a maritime lien, even though the service performed is of the nature which ordinarily gives a lien to a mariner. Certain things must concur. First and foremost there must be a credit of the ship. Out of the same engagement which gives rise to a mariner's lien, and a right to enforce it by a proceeding *in rem*, spring other legal rights and remedies. Whenever the law gives a lien for wages it also gives a right *in personam*, and the mariner may elect which remedy to pursue. His claim arises *ex contractu*. We submit the statement for the consideration of the court, that no lien can arise out of any employment, or by reason of the performance of any

labor of the kind mentioned, unless at the same time there arises a personal right of action. The two remedies are inseparably connected. One cannot exist without the other. They are both incidents of the same contract. In Taylor v. Carryl, 20 How. 583 (Star page 600), this court said: "In all causes of action, says the judge of the admiralty of Great Britain, which may arise during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could be maintained against a ship where the owners were not themselves personally liable, or where the liability had not been given up. (The Druid, 1 Wm. Rob. 399.) And the opinion of this court in The Schooner Freeman v. Buckingham, 18 How. 183, was to the same effect." In the cases at bar did any personal right of action accrue, and, if so, against whom? Certainly not against the receiver or any officer subordinate to him, for they were officers of the court, without personal liability, and the sailors did not deal or contract with any one else.

If no right *in personam* arose, how can it be claimed that there is a right *in rem* when the law, which gives the right *in rem*, at the same time and for the same service, gives a right *in personam?* This argument alone shows that the libellants have not all the rights under their contracts of employment usually appertaining to mariner's contracts. The reason is because they are contracts of a court of equity, and the rules of equity, which allowed the making of the contracts, necessarily affixed to them the incidents of receiver's con-

tracts. The rules of equity and admiralty are inconsistent. An admiralty court cannot make a contract. A court of equity cannot make a contract other than of the kind admitted by its principles. It follows that these contracts, being those of a court of equity, are governed by equitable rules, and chief among them is the method of payment, hereinbefore stated. If it is true that these libellants have liens on the vessels libeled, they must also have a personal right of action against the receiver as an individual. If the admiralty law supersedes one rule of equity, it should supersede all of them.

An important element in these cases is the fact that at no time were any of these vessels beyond the territorial jurisdiction of the court having them in charge. At no time were they expected to go beyond the jurisdiction. The character of the vessels precluded that possibility. When a vessel, being operated by a receiver, goes beyond the territorial jurisdiction of the appointing court, it immediately becomes subject to the process of the courts sitting in such foreign jurisdiction. This statement is not more true of admiralty than it is of courts of common law. It has been intimated, perhaps decided, that a foreign court acting upon a principle of comity, will decline to seize property in charge of a receiver of another court coming within its jurisdiction. We understand, however, the rule now to be that such foreign court will protect its own citizens, and will subject any property coming within its jurisdiction to the payment of their claims. Such a vessel

in a foreign jurisdiction is subject to seizure and attachment in an action at law, as well as a proceeding in admiralty. A vessel, sailing the high seas, must necessarily carry some one possessing authority to supply and man her, and the fact that she was dispatched on her voyage by a receiver would not prevent the presumption of a credit to the ship from arising in favor of material men and of sailors. *The Court* in sending the vessel beyond the limits of the state, would *abandon its jurisdiction* and subject her to those rules of admiralty made necessary for a successful voyage and a safe return. A case of this kind does not, however, stand upon the same basis as those on trial here.

We concede that the appointment of a receiver would not have any effect upon maritime liens which accrued prior to his appointment. Liens of this description are no exception to the general rule. The appointment of a receiver does not discharge any prior lien.

Moran v. Sturgis, 154 U. S. 256, 282.

High on Receivers (3d Ed.), Sec. 138.

We also concede that a purchaser under a receiver's sale would take property so sold subject to any lien attaching prior to the receivership and remaining unpaid. But it is denied that any lien, of any description, can arise within the jurisdiction of the court and out of its contract made while administering its equitable relief. It is also denied that, if such a lien can arise, it

will survive the final decree of the court in the cause in which the receiver was appointed and the contract made.

It is further admitted that while a vessel is in the custody of the law, she is subject to a lien, in case of accident or collision. This is true even when the vessel is sequestered in the hands of a marshal.

The Esteban de Antunano, 31 Fed. 920-1-4.

Paxson v. Cunningham, 63 Fed. Rep. 134.

The reason for this, so far as we can perceive, is that no personal right of action can arise as against an officer of the law, while acting in his official capacity under and within the directions of the court whose officer he is. Unless a right to proceed directly against the offending vessel is given, the law would not afford a remedy for a distinct damage. As said in Paxson v. Cunningham, 63 Fed. Rep. 134, "A maritime lien upon the offending ship for an injury by a collision is a *jus in re* in the ship itself." . . .

In cases of this character the vessel is regarded as a "sentient being, endowed with a personality capable of being called to account for injuries inflicted by it."

1 Am. & Eng. Ency. of Law, p. 200.

The rule, however, is different in matters of contract. In the Esteban de Antunano, 31 Fed. Rep. 924, the court says: "When the sheriff of the parish of Orleans, Louisiana, seized and took into his possession, under

process from the state court, the steamship Antunano, she went into the custody of the law, and her contemplated voyage was broken up and abandoned, and thereby the authority of her owners and of their agents, the master and ship's husband, to thereafter affect the ship by any conduct or contract to result in a lien on the ship was ended. By the seizure all persons were notified of the change of control and possession. While the ship was in the custody of the law it is doubtful whether on any account or for any service (except perhaps for salvage or through a collision) any lien could arise on the ship; certainly not without the express authority of the court having the property in possession. Liens for supplies and materials are based on contracts entered into on behalf of the ship. When there is no representative of the ship or her owners authorized to contract, there can be no contract, and therefore no lien based on a contract. The supposed necessities of the ship or of her crew would warrant no person in interfering without the authority of the sheriff or the court." And, on page 926 of the decision, the court says: "The material men in this case may seem to be badly treated, but it is not the fact. Each one of them furnished supplies with his eyes wide open —or else willfully shut—with the hope that, through some payment or settlement, the seizure of the ship would be released and the abandoned voyage resumed. Neither the ship nor the claimants are responsible for their too sanguine expectations." See also

Parker v. The Little Acme, 43 Fed. Rep. 925.
The Augustine Kobbe, 37 Fed. Rep. 696.

We realize in the cases last referred to the vessels were sequestered in the hands of officers of the courts having jurisdiction over the controversies pending, and that these officers were only empowered to keep the vessels and not to operate them. We also understand that the vessels libeled in these cases were being operated by the command of the court having them in charge. We cite these cases for the purpose of showing that the lien for wages arises out of contract, and springs from a presumption of a credit of the ship, as well as to note the distinctions drawn in cases of accident. These decisions are authorities to this further effect; that a person contracting with those in charge of a ship are held to some understanding of the situation of the vessel, and the power to bind the ship possessed by those assuming to act with regard to her. If a vessel in a particular case happens to be in the hands of a marshal, those contracting for the rendition of personal services or the furnishing of supplies are presumed in law to know the nature of the custody and the limitation of the power of the officer. In no other way can the authority of the court be maintained. If a vessel chances to be in the custody of a court of equity those contracting with the court or its employes must be presumed in law to know of that fact. And they must also be presumed to know that the rules prevailing in equity, as well in reference to the means of paying employes as in all other respects, are different from the rules in force in admiralty, and that the equitable rules control.

The receiver and all of the employes engaged in conducting the business of the railway and steam navigation lines of the defendant corporation were servants of the court. The court was one of competent jurisdiction; it had cognizance of the subject-matter of the litigation, and was proceeding to administer the well-settled rules of equity jurisprudence applicable in the particular case. The jurisdiction of the court was not partial. It was complete. Every act done by the receiver in purchasing supplies, employing servants, or to any other purpose, was the act of the court. *It was an exercise of jurisdiction.* It was contended, on the other side, and so decided by the lower court, that a maritime contract carried with it, as an incident, the right to a lien, and it is said this rule grows out of the necessities of commerce. We grant all that. But are the contracts in question maritime? And what commercial necessity exists for a lien in admiralty, when the property is at all times retained within the jurisdiction of the equity court, and when the court is bound under its rules to sell the vessels, if necessity arises, to pay the employes? There is no commercial or other necessity for a sale in admiralty when the power to sell in equity attaches as an *incident* to the contract. The same purpose is accomplished, but in a different forum, and in a different manner. The proctors for the libellants deem these considerations of no force. They open and close their cases with the declaration that these men made the contracts to work upon the vessels. That, they claim, is sufficient. It is true they made such contracts. But with whom? There were neces-

sarily two parties to the contracts. The sailors were the parties of the one part, and the court of equity the party of the other part. Did the court of equity renounce its principles and its jurisdiction when dealing with these favored individuals? It is impossible. It could not; it had no power to do so. No incident not known to the rules governing a court of equity could attach to any contract made by it. The very making of the contracts was an exercise of its equitable jurisdiction. We would say that the contracts were made by a court of equity, and the *incidents of a receiver's contract attached*, because of the jurisdiction of the court, and the character of the proceedings in which the contracts were made. A court cannot make a *contract* under which it may, by a hostile proceeding in another court, be ousted out of its own jurisdiction. *The libellants were employes of a court of equity, and not wards of admiralty.*

III.

It seems to us the argument necessary to be made to support the jurisdiction of admiralty in these cases totally fails to take notice of the system of laws as administered in the United States. In England at one time undignified contentions constantly arose between the courts of common law and admiralty. Very little respect seems to have been paid by either court to the process or orders of the other. In this country, as we understand it, there is no conflict in the jurisdiction of

the several courts, state or federal, common law, equity or admiralty. It is true that the rules governing in each forum are diverse, and the methods of procedure are different. Nevertheless the jurisdiction of courts of admiralty, of common law and of equity, is concurrent and co-ordinate, in the sense that when either of such courts, through its ordinary and known procedure, acquires jurisdiction of, and determines a particular subject-matter in litigation, the decree of such court is final and conclusive and cannot be reviewed, or the subject-matter thereof re-examined, in any other court. When a controversy has been determined by either of the tribunals named and has gone to final judgment, it is *res judicata* and cannot be reviewed or relitigated in the same court or in another tribunal administering different rules or applying different remedies. Counsel ask this court, as a court of admiralty, to decide that a court of equity by its final decree has failed to do justice in the particular case. It is tantamount to a request for a review of the final judgment of the equity court. It is a complaint, based upon the idea that if the matters had originally been under the jurisdiction of admiralty, different rules would have been applied. The admiralty rule is that the seaman has a lien paramount, practically speaking, to all others. The equity rule is that equality must prevail. It does not recognize one employe as being better than another. Each of the amended libels avers that the property in charge of the receiver was sold by him under the orders of the court. We contend that this decree is final and, after its affirmation by the Supreme Court of Oregon, conclusively settled all ques-

tions arising out of the receiver's management of the affairs of the corporation.

It is held that "the admiralty jurisdiction of courts of the United States, although exclusive on some subjects, is concurrent upon others. The courts of common law deal with ships or vessels as other personal property."

Taylor v. Carryl, 20 How. 583 et seq.

Freeman v. Howe, 24 How. 450-1-6.

The Hine v. Trevor, 4 Wall. 555, 556.

The Moses Taylor, 4 Wall. 411-412.

Tefft v. Sternberg, 40 Fed. 2-5.

Leon v. Galceran, 11 Wall. 185.

Steamboat v. Chase, 16 Wall. 522.

Sherlock v. Alling, 93 U. S. 99.

Schoonmaker v. Gilmore, 102 U. S. 118.

Insurance Co. v. Dunn, 19 Wall. 223.

New Orleans v. S. S. Co., 20 Wall. 387.

It is distinctly decided in the cases last cited that either a court of common law, or a court of equity, is competent to adjudicate questions arising out of maritime contracts. And that the jurisdiction is concurrent with admiralty. Such a court has no right to proceed *in rem* against the vessel, but it can hear and finally determine all such questions. And it may apply the remedy appropriate to the case. The only restriction resting upon the state courts in such matters is that

they may not adopt the forms of admiralty, but must proceed according to their own forms and administer remedies according to their own rules. The *result* is a *sale of the property.* And when once a state court has determined a matter it is settled, and cannot thereafter be brought within the jurisdiction of admiralty. We must make the confession, even though it be a humiliating one, that we cannot see any doubt about this. It is said in Taylor v. Carryl, supra, pages 599 and 600:

"It follows, by an inevitable induction from the cases of Harmar v. Dennie, 3 Pet. 299; Hagan v. Lucas, 10 Pet. 400; and Peck v. Jenness, 7 How. 612, that the custody acquired through the seizure of manual occupation of the Royal Saxon, under the attachment by the sheriff of Philadelphia county, could not legally be obstructed by the marshal, nor could he properly assert a concurrent right with him in the property, unless the court of admiralty holds some peculiar relation to the state courts or to the property attached, which authorized the action or right of its marshal. The relation of the district courts, as courts of admiralty, is defined with exactness and precision by Justice Story in his Commentaries on the Constitution. He says: 'Mr. Chancellor Kent and Mr. Rawle seem to think that the admiralty jurisdiction given by the constitution is, in all cases, necessarily exclusive. But it is believed that this opinion is founded on mistake. It is exclusive in all matters of prize for the reason that, at the common law, this jurisdiction is vested in the courts of admiralty to the exclusion of the courts of common law. But

in cases where the jurisdiction of common law and admiralty are concurrent (as in cases of possessory suits, mariners' wages and marine torts) there is nothing in the constitution necessarily leading to the conclusion that the jurisdiction was intended to be exclusive; and there is no better ground, upon general reasoning, to contend for it. The reasonable interpretation,' continues the commentator, 'would seem to be that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was concurrent, it remained so. Hence, the states could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the states may well retain and exercise the jurisdiction in cases of which the cognizance was previously concurrent in the courts of common law. This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common-law jurisdiction.' " (3 Story's Com., Sec. 1666, note.)

In conformity with this opinion, the habit of courts of common law has been to deal with ships as personal property, subject in the main like other personal property to municipal authority, and liable to their remedial process of attachment and execution and the titles to them, or contracts and torts relating to them are cognizable in these courts.

It has not been made a question here that the Royal Saxon could not be attached, or that the title could not be decided in replevin. But the district court seems to have considered that a ship was a juridical person, having a *status* in the courts of admiralty, and that the admiralty was entitled to precedence whenever any question arose which authorized a judicial tribunal to call this legal entity before it. The district court, in describing the source of its authority, says of the contract of bottomry that "it is made with the thing, and not the owner," and that the contract of the mariners is similar; that the *res* "represents" in that court all persons having a right and privilege, while the rights of the owner are treated as something incorporeal, separable from the *res*, and which might be seized by the sheriff, even though the *res* might be in the admiralty. The representation is not true in matter of fact, nor in point of law. Contracts with mariners for service, and other contracts of that kind, are made on behalf of owners who incur a personal responsibility; and if lenders on bottomry depend upon the vessel for payment it is because the liability of the owner is waived in the contract itself. "In all causes of action," says the judge of admiralty of Great Britain, "which may arise during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship where the owners are not themselves personally liable, or where the liability had not been given up." (The Druid, 1 Wm. Rob. 399.) And the opinion of the court in The Schooner Freeman v. Buckingham, 18 How. 183, was to the same effect.

In courts of common law the forms of action limit a suit to the persons whose legal right has been affected and those who have impaired or injured it. In chancery the number of parties is enlarged, and all are included who are interested in the object of the suit; and as the parties are generally known, they are made parties by name and special notice.

In admiralty all parties who have an interest in the *subject* of the suit—the *res*—may appear and each may propound independently his interest. The seizure of the *res* and the publication of the monition or invitation to appear is regarded as equivalent to the particular service of process in the courts of law and equity."

We take it to be settled that when one court of competent power acquires jurisdiction over a subject-matter of litigation and proceeds to final judgment, that judgment is conclusive, even though the parties litigant might in the first instance have selected another forum for the settlement of their differences. Hence, the well-recognized plea of a former adjudication. It is not necessary to cite any authority to support this statement as a general proposition. The reasons for the establishment of the principle are many and obvious. The force of judgments rendered in the United States comes direct from the constitution. This court is asked to make an exception in favor of a court of admiralty and against a court of equity. It is asked to go further than that. Counsel would have this court declare that the *act* of exercising jurisdiction in equity *confers* jurisdiction on admiralty.

Suppose a receiver is appointed in a federal court of a corporation engaged *exclusively in operating a line of steamboats on a river.* The receiver, pursuant to the orders of the court, purchases supplies and employs various individuals in different capacities on board the vessels. The earnings derived from the operation of the lines are insufficient to pay the wages of the employes, and the claims of those furnishing supplies. The employes and material men seek to libel the vessels in admiralty. The district judge, sitting in the circuit court, appointed the receiver and supervised the management of the property. The same judge, sitting in admiralty, pronounces judgment upon the showing made in the libel. Would he decide that he was powerless to enforce his contracts, made as chancellor, and proceed in admiralty to sell all of the property in his charge in equity? To say the least, this would be a curious termination of the equity proceedings, and a singular adjustment of the rights of those concerned. We suppose the chancellor would not have any judicial knowledge, in the equity case, of the admiralty proceedings. And we are incapable of surmising his emotions upon being formally notified by the receiver whom he had placed in charge of the property of the complete asportation of the subject-matter of the equity suit. A proceeding of this character would certainly not be accompanied by the gravity customarily attending judicial action. Suppose again that no libel is filed. The court of equity proceeds to final judgment. A decree is entered directing the sale of all the property in the hands of the receiver; first, to pay the expenses of opera-

tion incurred by the court. The property is not worth, and therefore it does not bring, the amount outstanding. All of the money realized is distributed pro rata among the employes and material men. A part of the claims remain unpaid. Would the equity judge, sitting in admiralty, take cognizance of a libel brought by the employes and material men for the unpaid balance, seize the property in the hands of the purchaser at the receiver's sale, and then sell the same property over again? It seems to us that upon the application first suggested the court would rule that equity had the power, which it would exercise, to sell the property for the benefit of the employes and others equally entitled. And, upon a libel filed after the receiver's sale, the ruling would be that the property had once been sold for the benefit of the libellants and the title had passed free from their claims. The libellants, strictly speaking, would not be parties to the equity proceedings. Nevertheless, the primary duty of the court is to protect their interests, and in the case supposed, as in these cases, the decree would provide that the property be sold for their benefit, and it would be so sold. If the decree contained error it could only be corrected on a direct appeal. If a double sale could not be made when the entire property consisted of steamboats, it could not be made in these cases where the property consisted half of steamboats and half of railroads. We apprehend the jurisdiction of admiralty is not influenced, nor does it depend upon a calculation of the proportion the steamboat lines bear to the railroad lines. Sailors in admiralty, *and in equity* are entitled to have the vessels sold to pay their

wages. In neither court can they twice sell the same property for the same purpose, nor can they accomplish this end by proceedings in both courts. The *final decree* of the court of equity is as much an *adjudication* of the rights of employes and all others interested as it would be if they were all joined in the suit. The court employing these seamen was at all times open to receive any representation, by proper petition, which they might have seen fit to make, looking towards the protection of their rights. In admiralty they would not have been entitled to any greater relief than they were in equity. In equity they were entitled to and received the entire proceeds of this hopelessly bankrupt property. Can they, after accepting their proportion of the moneys arising from the sale, rush into another court and cause the resale of a part of the same property for their own peculiar and special benefit?

Suppose a sailor entitled to a lien on a particular vessel should elect to bring an action in a court of common law, as he might do, and in the proceedings thus instituted sell the vessel under execution for his claim. The amount realized is not sufficient to pay him in full. Could he then proceed in admiralty *in rem*, and seize the ship in the hands of a purchaser at the first execution sale? The case supposed is really not different from those at bar. The sailor would have a right to bring an action at common law for the amount due him. The decisions expressly so hold, and the statutes of the United States reserve it to him. Section 563 reads as follows: "The district courts shall have jurisdiction as

follows: . . . Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases, the right of a common-law remedy, where the common law is competent to give it."

It is true that a seaman cannot, in an ordinary case, bring suit in a court of equity to enforce the claim due him. In these cases, however, the demands in his favor arose out of the operation of the property of the railway company by an equity court, and after its jurisdiction had attached. Here, by reason of circumstances of an unusual character, the seaman *was in* a court of equity, and that court had complete power and control over all matters pertaining to the management of the affairs of the corporation. Certainly it will be conceded if equity had the power to make the contracts it had power to enforce them, and they must in their nature be equitable contracts. Suppose these libellants had represented by proper petition to the court of equity having these matters in charge, that they, as employes on board boats, had a right to full payment of their wages out of the proceeds of the sale of all of this property before any one else was entitled to receive anything. They would have had a standing in court for the purpose of making this or any other pertinent representation. And suppose they had supported their petition by the argument that in admiralty they would be entitled to such a priority. The court of equity could have made but one answer. It was not administering admiralty rules. That the contracts in question were made with a court of equity and no favoritism was permitted by its doc-

trines. That they were limited to the remedy given by equity. Suppose, further, that these employes should have attempted in some fashion, it is inconceivable how, to move a court of admiralty to cause a distribution of the funds arising from the sale, and in the hands of the equity court, in accordance with the rules of admiralty. There is no practical difference between the case supposed and those at bar. In the case supposed, they would attempt to interfere through admiralty with the apportionment of funds in the hands of a court of equity by denying the jurisdiction of the court to apportion them otherwise than as prescribed by the admiralty law. In the cases on trial here, they have accepted their *prorata* of the fund, and now seek, in admiralty, to deny the jurisdiction of the equity court, and to compel a relitigation of the matters already determined and a readjustment of their rights.

One other point in this connection. A suit to foreclose a mortgage is in its nature a proceeding *in rem.*

Farmers Loan & Trust Co. v. Nor. Pac. R. R. Co., 69 Fed. 871-2-8, 880-882-884.

Martin v. Pond, 30 Fed. 15.

Railway Co. v. Gay, 26 S. W. 599.

In the case of the Farmers Loan & Trust Co. v. Nor. Pac. R. R. Co., supra, at page 884 the court says: . . . "And proceedings *in rem* are impossible in a court having no jurisdiction of the *res*. Now as the

custody, control and operation of a railroad through receivers must be pursuant to proceedings *in rem* jurisdiction thereof cannot be acquired by a distant court, although it may have jurisdiction to foreclose the mortgage by a suit *in personam*."

It may be said that the suit to foreclose the mortgage mentioned, in which these vessels were sold, was not a proceeding *in rem*, as the phrase is generally used. All of the property, however, was necessarily in the possession of the court, and was sold in specie under a decree directly authorizing the sale. Whether the proceeding is called one *in rem*, or is properly designated by another name, is purely a question of nomenclature. The principle is the same.

Mr. Chief Justice Marshall says, in speaking of a judgment *in rem* in Williams v. Armroyd, 7 Cranch, 423, 432, cited in Hilton v. Guyot, 159 U. S. 167: "The sentence of a competent court proceeding *in rem* is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of co-ordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law, can never arise, for no co-ordinate tribunal is capable of making the inquiry." And it has been very recently held in Hilton v. Guyot, supra, page 167, that "the most common illustrations of this are decrees of courts of admiralty and

prize, which proceed upon principles of international law. . . . *But the same rule applies to judgments in rem under municipal law.*" See also Eunis v. Smith, 14 How. 251.

And it is decided that, "By the law of most if not all civilized nations, the sale of a vessel by a proceeding *in rem*, in a court of competent jurisdiction, extinguishes all liens upon her and vests a clear and indefeasible title in the purchaser."

The Amelie, 6 Wall. 18.

Taylor v. Carryl, 20 How. 583.

Freeman v. Howe, 24 How. 450.

Tefft v. Sternberg, 40 Fed. 2.

It is clear that the court of equity was a court of competent authority. It had jurisdiction of the subject-matter of the litigation. The jurisdiction was exercised. Final decree was entered and affirmed by the court of last resort. The property seized under the process of the district court has been once sold for the benefit of libellants. It cannot be again sold in admiralty, or elsewhere, for the same purpose. The libellants are creditors of the receiver and stand upon precisely the same footing as all other creditors. When they were employed they gave credit to the entire trust property. They have received the full proceeds arising therefrom.

IV.

We think these cases will be determined upon the points hereinbefore suggested. We ask permission, however, to briefly present two other points relating to different branches of the cases. The questions are of importance and the authorities conflicting. If these remaining questions are not jurisdictional ones, the arguments will not be considered.

Libellant George Dowsett sues on a claim due him personally and on another claim transferred to him by assignment. The point was made in the lower court that a right to a lien in admiralty is a personal privilege and one which cannot be assigned so as to give the assignee a right to maintain a proceeding *in rem in* admiralty. This seems to have been the ruling in the following cases:

Logan v. The Aeolian, 15 Fed. Cases, 786.

Rusk v. The Freestone, 21 Id. 19.

The Pride of America, 19 Fed. Rep. 607, 608.

The Gate City, 5 Biss. 200.

The opposite view is expressed in

American Eagle, 19 Fed. 879.

M. Vandercook, 24 Id. 474.

Liberty No. 4, 7 Id. 231.

The New Idea, 60 Id. 294.

V.

It is contended by the appellants that a court of admiralty has no jurisdiction to enforce the claims of R. J. Young and George Raabe in the case of the Three Sisters, and the claims of the same parties in the case of the Wm. M. Hoag, because they are barred by the limitation of the Oregon statutes. It has been stipulated that the decision in the case of the Three Sisters shall determine the points involved in the case of the Wm. M. Hoag. Young and Raabe each acted as captain. The amended libel states that Raabe acted "as captain and watchman in charge of said boat at the agreed price of $125.00 per month." Under the general admiralty rules the master of a vessel is not entitled to a lien for his wages. The rule is the same when the master employs himself in some other and additional capacity.

14 Am. & Eng. Ency. of Law, p. 430 and note.

M. Vandercook, 24 Fed. Rep. 472. 474-5.

The Aeolian, 1 Biss. 321.

The existence of this rule made it necessary for opposing counsel to rest these claims upon the provisions of the law of Oregon extending the jurisdiction of admiralty. The state statute gives all persons employed upon a boat a lien to secure their pay. It is provided by Sec. 3706 of the law hereinbefore quoted, that "all actions against a boat or vessel under the provisions of this title shall be commenced within one year after the

cause of action shall have accrued." Judge Deady, sitting as the District Judge of the United States for the District of Oregon, construed this identical statute.

The City of Salem, 31 Fed. Rep. 616, 619.

The court, on page 619 of that decision, says: "In enforcing liens on vessels given by state statutes, courts of admiralty do so subject to every qualification and limitation attached to them by such statutes," citing The Alida, 1 Abb. Admr. 165. See also

The Red Wing, 14 Fed. Rep. 869.

The Lottawanna, 88 U. S. 559, 582.

In the case of the Red Wing, supra, the court says: "Where a lien for supplies furnished a vessel at its home port was, by the terms of the statute conferring it, only enforceable within nine months after the supplies were furnished, and the vessel to which they were furnished was, during the whole of the prescribed period, in the custody of a state court; *held* that the fact of such custody did not enlarge or suspend the operation of the state statute." The statement of facts in the case shows that "the defendant vessel was owned by a corporation whose assets, including the vessels named, had passed into the custody of a receiver, appointed by the state court *after the demand accrued*, and that immediately after such custody ceased the suit was instituted, although nine months had elapsed."

It was argued by the other side in the court below and so decided, that all of the provisions of the statute which undertake to confer upon state courts jurisdiction to enforce the liens given by the acts are void. "And," says the court, "the limitation of such actions is therefore necessarily ineffectual and void." It is definitely decided that the courts of the several states have no power to enforce maritime contracts by a proceeding *in rem*, because the constitution has reposed the exclusive jurisdiction, to apply the particular remedy, in courts of admiralty. But, with all deference to the learned court below, we are unable to comprehend what this has to do with the power of the legislature to attach conditions to new rights given by it to admiralty courts. It is well settled that admiralty will enforce a state statute giving liens on vessels where none existed under the general admiralty law, and that courts of admiralty will enforce the new law according to their own peculiar forms. If a court of admiralty will enforce a state statute of the kind mentioned, what overpowering authority has it to select certain portions of the statute and reject others? If the state may confer jurisdiction upon the admiralty courts, why can it not name the reasonable conditions upon which it may be exercised? Surely a suitor, invoking the aid of a statute, cannot mutilate it so as to serve his own purposes, and defeat the intention of the legislature. This section imposing a limitation is a part of the law conferring the lien, and was passed at the same time. In effect, the statute says certain persons may have a lien for one year, and no longer. The lower court says, by force of the statute

certain persons have liens for any number of years. We do not see anything in the case of the Hine v. Trevor, 4 Wall, 555, cited by the lower court, sanctioning such a construction. It cannot be said that this section is intended to apply only to the state courts. It is intended to govern any court in which the lien given may be enforced.

The meaning of this law, like any other one, we suppose is to be found by an examination of all its provisions. If a part of it is to be rejected, all of it ought to be upon the particular point. It seems to us, and we submit it to the court for decision, that the true interpretation of this statute is, that the persons specified may have the lien given on condition that they proceed to its enforcement within the period named. It is a right founded upon a condition. The condition is a part of the right. It modifies and limits the right. It detracts something from it. The grant and the condition annexed in reality form the right. The right to the lien is qualified. Precisely what it is can only be ascertained upon reading and accepting the whole statute. This court has held that it is necessary to comply with the formalities prescribed by the state law to perfect a lien. The Lottawanna, 21 Wall. 558, 559, 578, 579. On pages 578 and 579 it is said, "And a further act provides that if the privilege be not in writing, the facts on which it is based must be stated in the affidavit, which must be recorded" (citing Revised Civil Code). "*None of these requisites having* been performed, no lien can be claimed under the state law." From this

decision we infer the rule of this court is, that persons invoking the aid of a state statute in admiralty are compelled to comply with the statute in all essential respects. If it is necessary to comply with the terms of the staute to perfect a lien, why is not the same compliance imperative as a prerequisite to the right to enforce a lien? It was claimed by the libellants that the limitation would not run during the time the vessel was in the hands of a receiver. The case of the Red Wing, *supra*, fully covers this point. In support of this contention, the argument was that admiralty could not obtain jurisdiction without a seizure, and in consequence no action could be begun during the receiver's possession. This argument will not bear scrutiny. The statute hereinbefore quoted prescribes that all actions, etc., "shall be *commenced* within one year," etc. The *commencement* of an action and the acquisition of *jurisdiction* over the defendant, or the thing proceeded against, are two different matters. This particular statute stands alone. The question is, when within its meaning is an action deemed to be *commenced?* It would seem to us, that the filing of the libel is the commencement of the proceeding. The filing of the libel accomplishes something. If it does not commence the proceeding, we are at a loss to understand what effect it has.

The rule that a court of admiralty has no jurisdiction of the *res* until after seizure, does not state that the action is not commenced until after seizure. In the absence of any express statement in the law to that

effect, it would seem to us the filing of a libel is in law, what it is in fact, the commencement of the proceedings. How can any seizure be made until after the proceedings are commenced? Is the seizure of a vessel under a writ, issued at the instance of a libellant, the commencement of the proceeding, or is it the final act giving the court jurisdiction over the *res* under the proceeding theretofore commenced? In the City of Salem, 31 Fed Rep. 619, the court says, "Neither can the bank have a lien for this demand, unless it appears that it accrued within one year from the *filing of the libel.*" . . . And in the Red Wing, 14 Fed. Rep. 872, it is said, "The fact that the lien could not have been previously *enforced* by seizure, in consequence of the custody of the state court, does not enlarge or suspend the operation of the statute. The lien expired before the suit was brought." With deference to the lower court we suggest that this is the only correct construction of this statute. Any other might render the law nugatory, or else prolong the statutory period indefinitely. The limitation of this statute begins to run from the time the cause of action accrues, and not from the time plaintiff may choose, or be able, to seize the boat. Suppose a merchant should furnish supplies to a vessel, in this, her home port. The statute would give him a lien for the amount due. Payment is not made, and the vessel sails for a foreign country. Within a year a libel is duly filed and a writ issued commanding the marshal to seize the ship. He returns his inability to do so, because of the absence of the vessel beyond his jurisdiction. In such a case would it be held

that the action had not been commenced because no seizure had been made? We do not think so. It seems to us if the opposing argument is to prevail, the result will be not only a violation of the statute, but also of the principle of business policy which condemns secret liens. It was said by Mr. Justice Bradley, in the Lottawanna, *supra*, that "the existence of secret liens is not in accord with the spirit of our commercial usages, and a uniform law by which the liens in question should be required, within a reasonable time, to be placed on record in the custom house, like mortgages, and otherwise properly regulated, would be a great advantage to the business community."

It seems to us, by holding in accord with The City of Salem, and The Red Wing, *supra*, lien holders, will be compelled to file their libels within the year, although seizure cannot be made, thus making their claims matters of public record, and often of public notoriety.

A stipulation has been entered into agreeing to submit these causes on printed briefs, and without oral argument.

We trust that this fact, in connection with what seems to us the importance of the questions involved, will serve as an apology for the length of this brief.

Portland, Ore., August 27th, 1897.

Respectfully submitted,
WILLIAM T. MUIR,
Of Proctors for Claimants.

JOHN W. WHALLEY and
WILLIAM T. MUIR,
Proctors for Claimants.

No. 136, 135 & 138.

Brief of Whalley & Muir for

Filed Nov. 1897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

THE STEAM TUG "RESOLUTE," A. B. HAMMOND, and E. L. BONNER,
Claimants and Appellants.
vs.
HENRY E. WILSON, SIDNEY G. WOLFKILL, THOMAS NELSON & CHARLES JAHN,
Libellants and Respondents.
No. 16,200

THE STEAM TUG "RESOLUTE," A. B. HAMMOND and E. L. BONNER,
Claimants and Appellants.
vs.
GEORGE DOWSETT,
Libellant and Respondent.
No. 16,199

THE STEAMER "THREE SISTERS," THE OREGON CENTRAL AND EASTERN RAILROAD COMPANY,
Claimants and Appellants.
vs.
R. J. YOUNG, M. BELL, C. A. BELL, H. ROBERTSON, W. HOWELL, W. H. SUTTON, *et al*,
Libellants and Respondents.
No. 16,202

Appeal from the District Court of the United States for the District of Oregon.

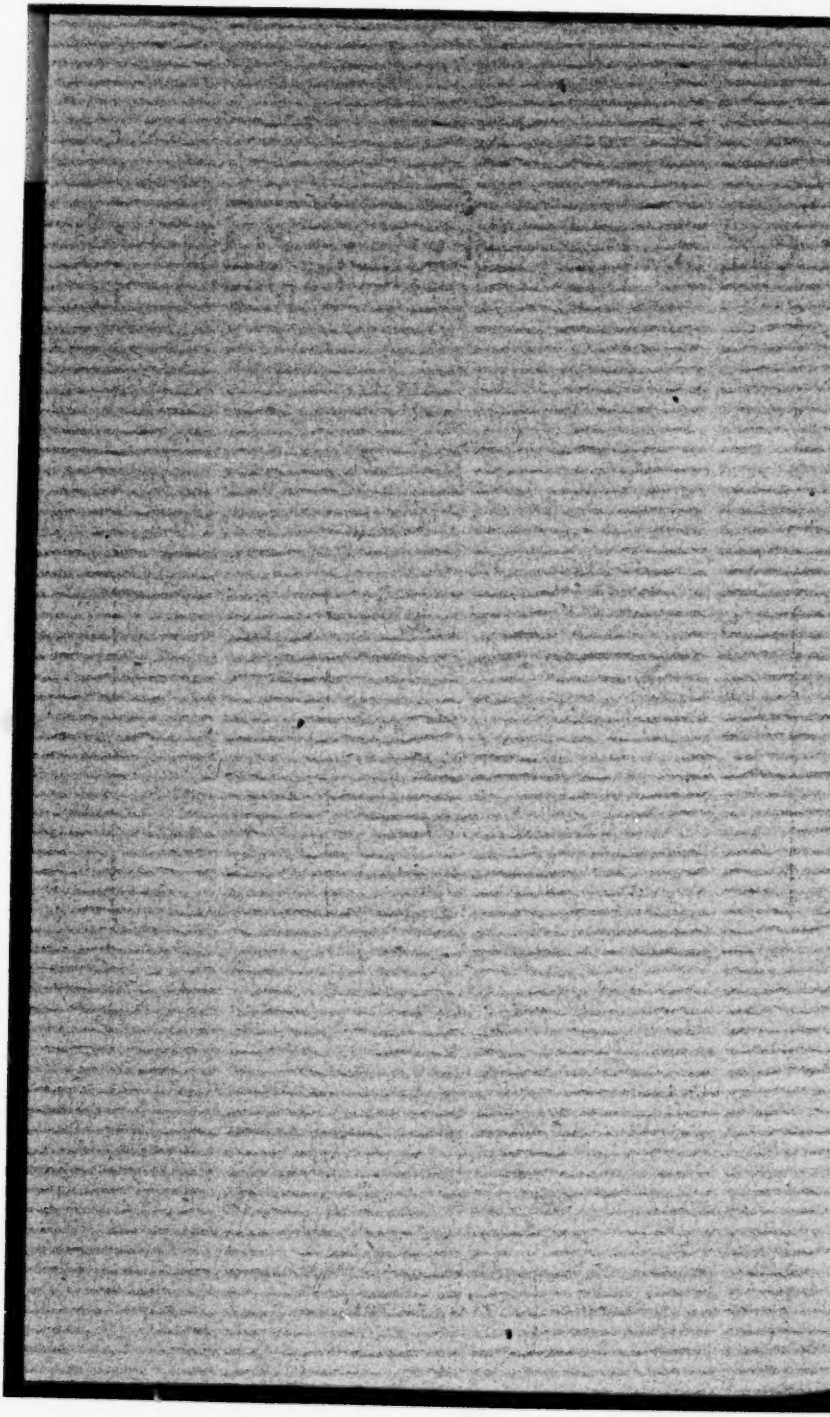
BRIEF FOR APPELLANTS

IN REPLY ON MOTION TO DISMISS APPEALS.

JOHN W. WHALLEY and
WILLIAM T. MUIR,
Proctors for Claimants.

WILLIAM T. MUIR,
Of Proctor for Claimants.

The Lewis & Dryden Printing Co.
1897.



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The argument filed for the respondents, found on pages 3 to 10, inclusive, of their brief, assumes the point in issue. It is there stated that no appeal lies

to this court in these cases, because the court below had jurisdiction of the parties and of the *subject matter* of litigation, and that if any error was committed it was error on the merits which cannot be considered here.

The only point insisted upon by appellants is that the lower court did not have jurisdiction of the *subject matter* of the litigation. The method of discussion pursued does not alter this fact. The argument made under subdivision 2, pages 22 to 38 of our original brief, is intended to show that, owing to the circumstances attendant upon the transactions set out in the amended libels, no right of action *in rem or in personam* arose in favor of the libellants of which a court of admiralty could take cognizance. The ultimate reason, as explained on pages 37 and 38 of the brief mentioned, is because the contracts pleaded are not maritime contracts.

And the argument made under subdivision 3, pages 38 to 52 of our former brief, is designed to show that the matters alleged in the amended libels have passed to final judgment and cannot form the *subject matter* of litigation in a court of admiralty or any other court.

We entirely agree with the authorities quoted in the opposing brief defining the meaning of the term jurisdiction. It is the "power to hear and determine the subject-matter in controversy between parties to a suit." We also agree in the statement there made that "if the law confers the power to render a judgment

or decree, then the court had jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case; is judicial action, by hearing and determining it."

The first question confronting every court in every case, and one which it must determine before examining into the merits, or proceeding to decide "with which party is the right of the case," is whether the court has jurisdiction of the subject-matter of litigation, and then whether it has jurisdiction of the parties thereto. If it has not jurisdiction of the subject-matter, it cannot proceed further, even though the parties are in court willing to proceed. "The question of the true limits of maritime law and admiralty jurisdiction is exclusively a judicial question."

The Lottawanna, 21 Wall. 558, 572.

The Scotland, 105 U. S. 24.

It is held in Taylor v. Carryl, 20 How. 583, 599, 600, that the reasonable interpretation of the constitution "would seem to be that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law." To the same effect, see

The Scotland, 105 U. S. 24.

The Lottawanna, 21 Wall. 558.

Receiverships were unknown at common law. A receiver's contract has never, until the decision of the lower court, been held to be a maritime contract. So the question here is, whether the rules of equity govern the contracts mentioned in the amended libels, or whether they are governed by admiralty rules. If the rules of equity control, the contracts are equitable. If the rules of admiralty control, the contracts are maritime. If the first is held to be the law, the lower court had no jurisdiction. If the latter is held, it did have. Certainly this is purely and distinctively a question of jurisdiction over the subject-matter. The lower court decided in favor of the admiralty jurisdiction. It held the contracts maritime. We appeal from the decision and ask the judgment of this court upon the correctness of the ruling below. It is held in Insurance Co. v. Dunham, 11 Wall. 31, that "perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed."

And it is held that "there is no jurisdiction in admiralty to foreclose a mortgage of a vessel by a sale, or by transfer of the possession to the mortgagee."

The John Jay, 17 How. 399.

The District Court of the United States, sitting in admiralty, has no jurisdiction of a contract of partnership for the use of a vessel put into a line for carrying passengers and freight. The contract arranged the contributions which each party was to make and the

share of profits to be received; and though one of the parties furnished the vessel, the contract was not a charter party.

Ward v. Thompson, 22 How. 330.

"This court reasserts the doctrine that the circuit court, sitting in an admiralty court, has no jurisdiction to foreclose or give other remedy on a mortgage."

Schuchardt v. Babbidge et al., 19 How. 239.

"The principal question is, whether the case made is within the admiralty jurisdiction. That it would not be within the admiralty jurisdiction in England is clear. In general, contracts upon land, though to be executed upon the sea, and contracts at sea, if to be executed on the land, are not cognizable by the English admiralty. There are some exceptions to this rule in that country; but none, it is believed, which affect the question now before us. There are conflicting decisions as to the admiralty jurisdiction in England, and also in this country. It may be difficult, if not impracticable, to state with precision the line of this jurisdiction, but we may approximate it by consulting the decisions of our own courts.

"In the case of Willard v. Dorr, 3 Mason, 91, it was held, 'no suit for services performed by the master, as a factor, or in any other character than that of master, is cognizable in the admiralty.' And again, in Plummer v. Will, 4 Mason C. R. 380, it was said, 'a contract

of a special nature is not cognizable in the admiralty, merely because the consideration of the contract is maritime. The whole contract must, in its essence, be maritime, or for compensation for maritime service.' In 11 Peters, the Steamboat Orleans v. Phoebus, it was said the admiralty has no jurisdiction in matters of account between part owners. And, further, 'the jurisdiction of courts of admiralty, in case of part owners, having unequal interests and shares, is not, and never has been, applied to direct a sale upon any dispute between them as to the trade and navigation of the ship engaged in maritime voyages, properly so called.' (Ib.)

"The jurisdiction of courts of admiralty is limited, in matters of contract, to those, and to those only, which are maritime. (Ib.)

"An agreement by the master of a vessel to pay wages may be sued upon in the admiralty; but a stipulation in the same contract to pay a sum of money in case the voyage should be altered or discontinued, can be enforced only at common law. (L. Arira v. Manwaring, Bee's Rep. 199.) The admiralty jurisdiction of the District Courts of the United States, being exclusive, cannot be extended to cases of law or equity, cognizable by the circuit and state courts, under the 11th section of the judiciary act. (1 Baldwin, 554.)"

Grant et al. v. Poillon, 20 H. 162.

Numerous cases have been brought in the admiralty courts of this country in which the contracts relied upon have been adjudged not to be maritime, and the

jurisdiction has been consequently denied. And the questions thus raised have always been regarded as jurisdictional. They cannot be treated in any other way.

Opposing counsel seems to think that because the vessels were within the territorial jurisdiction of the district court; because they were seized, and because the claimants appeared, the lower court had jurisdiction, and could proceed to hear the case upon the merits. He seems to also think that any ruling thereafter made by the court was a decision upon the merits. And it is argued that this is true because the court, in rendering a decision, must take into consideration the facts appearing. Nothing could be more fallacious. Any one might file a pleading in any kind of a case, and a marshal might seize any kind of personal property, but the fact of the filing of the pleading called a libel, and the fact of the seizure, would not give the court jurisdiction over the cause. The court would have to determine whether the subject-matter of the litigation was maritime. This would depend upon the nature of the contract sued on. If a person should attempt to libel a vessel to foreclose a contract of mortgage of the kind mentioned in the case of the John Jay, *supra*, and the marshal should seize her, these facts would not give the court any right to either hear or determine the controversy. And if it did assume to hear and determine it, an appeal would lie to this court upon the question of the power of the lower court to take cognizance of the cause, and the judgment rendered below would be declared void.

Counsel seems to suppose that, because it is sometimes necessary to consider facts in order to reach a conclusion whether a controversy is within the maritime jurisdiction, the decision of the point is always upon the merits. This is not so. It makes no difference at what stage of the proceeding, whether during the taking of testimony or otherwise, the defect of jurisdiction appears, or how it may arise, it is the duty of the court to at once cease all further cognizance of the cause.

2 Conkling's U. S. Admir. (2d Ed., Rev.), p. 229.

The Maggie Hammond, 9 Wall. 435.

It is stated, on page 4 of the opposing brief, that at the time of the seizures "The Resolute" and "The Three Sisters" were within the district of Oregon, and were lawfully seized by the marshal of the court below. In this statement, as in every other statement in this portion of his brief, counsel has assumed in his favor the question to be decided upon these appeals. Our position is that, while in a sense the seizure was lawful, at the same time it was not rightful. If the court had no jurisdiction of the subject-matter of the action, there was no power to seize, and the seizure having been made, upon a showing that the subject-matter of the action was not within the cognizance of the court, the custody of the marshal should have been released. Mere seizure could not give jurisdiction unless, as before stated, there existed a right to seize. If it is to be decided that admiralty has jurisdiction of any prop-

erty which is capable of physical seizure, or that the jurisdiction of the court proceeds from the fact that the thing was seized, it seems to us that the jurisdiction of admiralty is limited only by the various kinds of personal property capable of manual possession. In every case of a seizure, the question of the validity and the rightfulness of the seizure is one to be determined upon an examination of the libels under which the seizure was made. If the libels disclose the fact, as we claim in these cases they do, that the contracts are not maritime, or, in other words, that the subject-matter of the litigation is not within the jurisdiction of admiralty, the seizure must be adjudged to be irregular and one which cannot be maintained. For this reason we say that the claim made for the libellants, on page 4 of the brief, "that the court below therefore had jurisdiction of the parties and of the subject-matter of the action. It therefore had a right to decide the questions presented by the exceptions to the libels," is incorrect. The statement that the court below had jurisdiction over the subject-matter assumes the identical question in dispute. If the court had jurisdiction over the subject-matter, as shown by the allegations of the amended libels, it had power to seize the vessels and had power to determine all the controversies. If, however, the lower court did not have jurisdiction over the subject-matter, then it had no power to do any of these things, and that is precisely the point upon which we seek the determination of this court. It is purely jurisdictional, and this court is the only one to which we could have appealed.

On page 10 of the opposing brief, it is said, in reference to the argument in the original brief filed by us, and commencing on page 38 thereof: "This point is equivalent to a plea of prior adjudication." A comparison of the original libels with the amended libels will show that the allegations that "all the property in charge of the receiver of the state court, including the vessels libeled," were sold under the order of the court, were not contained in the original libels, but were inserted in the amended libels. With these amendments it became unnecessary to file exceptive allegations. The amended libels upon their face show all the facts, and made it possible to try these cases upon exceptions thereto. These exceptions are not intended to be the equivalent of a plea of prior adjudication, but are designed to raise a question of law as to the jurisdiction of the court over the subject-matter, upon the facts as shown by the amended libels and admitted by the exceptions.

This remarkable statement is made on page 10 of the brief: "Certainly any court in which such a plea was presented has undoubted jurisdiction to hear such plea and decide thereon. If this be not so, then it would only be necessary to set up a plea of prior adjudication, and then insist that the court was without jurdiction to hear it. According to appellants' argument, the court would be without jurisdiction to hear the plea, and such plea would therefore have to remain forever undecided." This is a peculiar deduction from the arguments made in the original brief, and is certainly

not justified by anything therein contained. Our contention, as we have before stated, is that a court must, whenever the question is raised, and at whatever stage of the proceeding it occurs, decide upon its own jurisdiction. It matters not whether this point is raised by a plea of prior adjudication, whether it is raised by a demurrer, or by exceptions, as in these cases, when the facts appear and are admitted, or whether it is raised during the course of the taking of testimony. The court must at once address itself to a determination of the point, and whatever may be its decision, under the act of 1891, this court is the only court to which an appeal may be taken.

It is stated, on page 2 of counsel's brief, that "on pages 25 and 49 of the appellant's brief, a statement is made that the vessels libeled were sold with other property for the benefit of the respondents, and that the respondents have received a portion of the proceeds of the sale. No such fact is stated anywhere in the record, and the statement is without foundation in fact." It is true that it is nowhere stated in the amended libels that the respondents received a proportion of the moneys arising from the sale of this property, but the amended libels show that all of this property, including the libeled vessels, was sold under the final decree of the equity court, in a proceeding the nature of which is disclosed. Our position in this regard is that it is the duty, under the undisputed law, of an equity court, in making final disposition of property which has been operated by it through a receiver, to provide in its

decree, first for the payment of the operating expenses incurred by the receiver. In case of a failure to make this provision, a decree would contain error, and this error could only be corrected upon direct appeal in the cause in which the decree was entered. We have assumed in our former argument, and we think we have a right to assume, that the decree of the court of equity was rendered in conformity to the law, and did make the provision for the distribution of these funds as stated in the brief. The correctness of that decree cannot be questioned here. However, it makes no difference for the purposes of our argument whether the libellants accepted their pro rata or whether they declined it. If they accepted it, they are entitled to no more; and if they declined it, that fact would not give admiralty jurisdiction over the subject-matter of this litigation.

It is not necessary to consider all of the arguments contained in the portion of the brief referred to. The same error prevails throughout. Counsel has assumed that it is conceded that the lower court had jurisdiction of the subject-matter. No such concession is made. That is the question we claim a right to have decided here.

Objection is made to the form of the certificate of the trial court, for the reason that "no question concerning the jurisdiction of the District Court of the United States for the District of Oregon over said cause has been certified to this court from the said district court for decision."

Further objection is made "that no question concerning the jurisdiction of the District Court of the United States for the District of Oregon over said cause has alone been certified to this court from the said court for decision, but, on the contrary, the matter undertaken to be certified to this court by the said district court involves questions not relating to the jurisdiction of said district court over this cause."

Some argument is presented in our original brief, pages 14 to 22 inclusive, touching the right to and form of appeal, which we request the court to consider in connection with the statements now to be made.

The portion of the federal statute governing the method of appealing to this court from a decision of a district or circuit court of the United States is as follows:

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision."

Sup. to Rev. Stat. 1874-1891, p. 903, sec. 5.

The following is the form of the appeal in all of these cases:

"The above-named claimants, * * * conceiving themselves aggrieved by the final judgment rendered herein on the * * * day of * * * 1895, in the above-entitled proceedings, do hereby appeal from

the said final judgment to the Supreme Court of the United States, and they pray that this, their appeal, may be allowed, and that the question of the jurisdiction of the above-entitled court to render said judgment be certified to the Supreme Court of the United States, and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States." Subsequent to the filing of this petition for an appeal, the claimants filed their assignment of errors in the district court. The district court, in the order allowing the appeal, made the following certificate:

"Be it remembered that on this day in the above-entitled cause came Wm. T. Muir, of proctors for claimants, and filed herein his assignment of errors, and petition for an allowance of an appeal herein to the Supreme Court of the United States from the decree herein rendered on * * * 1895, which decree is as follows, to-wit: (Here follows copy of the decree.) And in open court the said claimants, by their said proctors, prayed that said appeal be allowed, and tendered a bond with sufficient surety to the approval of the court, which bond is hereby approved, to stay proceedings herein until said appeal shall have been determined, and thereupon the court hereby allows said appeal and approves said bond, and execution is hereby stayed until the determination of said appeal. And this court does hereby certify and make known unto the Supreme Court of the United States that the *only*

question arising upon said appeal is the *question* as to whether or not, under the facts stated in the amended libel and the exceptions thereto, this court acquired or had jurisdiction to hear or pronounce the said decree, and that the following is a copy of the said amended libel and the exceptions thereto. (Here follows copy of the amended libel and the exceptions.)" This allowance of appeal and certificate was signed by the judge of the court below.

As we understand it, a certificate of the trial court is necessary, under the act of 1891, to give this court jurisdiction in any case. Maynard v. Hecht, 151 U. S. 324. This jurisdictional prerequisite is certainly met by the certificate above referred to. The remaining question is whether the certificate is in proper form. A number of decisions have been rendered by this court upon objections raised as to the form of the certificate. We have found no case where there was a certificate satisfying this jurisdictional prerequisite, in which this court has held that the form of the certificate as a matter of practice was insufficient; on the contrary, whenever the certificate has been made by the trial court, this court has held that it had jurisdiction to determine the jurisdictional question certified.

The form and character of the certificate is a question of practice. It is not prescribed by the statute, and this court has not announced a rule covering the point, nor defined precisely how the certificate should be framed. Taken together, the petition for an appeal,

the allowance of the appeal, and the certificate of the judge, are equivalent to a statement by the lower court to this court that "these (referring to and copying the amended libels) are the undisputed facts; that the question raised on these appeals is whether, under these undisputed facts, a court of admiralty had jurisdiction to hear and determine the cause." It seems to us that no more satisfactory course could have been pursued. It was not necessary for the court below to state in its certificate that the question was whether a court of admiralty had jurisdiction to enforce a receiver's contract, and to state specially the other matters necessary to a clear comprehension of the particular character of the contracts and the claims made thereunder, because all of these facts appear as clearly and as briefly from the facts certified to this court as they could have been made to appear by a certificate of the court reciting, independently of the amended libels, the facts stated therein. We submit that the amended libels do not state any fact not necessary for the consideration of the court in the determination of this controversy, and that the judge of the court below could not have stated these facts more clearly or in shorter compass than they are stated in the certificate. We are inclined to the belief that if any of the facts stated in the amended libels had been omitted from the certificate of the judge or the record sent up, counsel on the other side would have had some reason for complaint, on the ground that the true nature of the controversy was not disclosed by the record forwarded to this court.

The lower court, in its opinion, asks and decides this question (see p. 744, 69 Federal Reporter): "Does the fact that the wages are earned in an employment by a receiver take the case out of the general rule which confers jurisdiction upon the admiralty courts for any reason?" This expression of the lower court in its opinion, which is certified to this court, shows the nature of the jurisdictional question decided by that court. The argument and the reasoning of the court does not affect the character of the question which was before it. In Shields v. Coleman, 157 U. S. 168, and in Smith v. McKay, 161 U. S. 355, 357, the lower court certified to this court the portions of the record necessary to be considered on the appeals, and this court held that that was a proper method of stating the question of jurisdiction. This course was pursued in these cases. The certificates state that the appeals were taken *only* on the *question* of jurisdiction. The precise question in each case plainly appears from the certificates to be, whether the contracts alleged in the amended libels were maritime contracts, and, in consequence, whether the lower court had jurisdiction over the subject-matter of the controversy.

The objection raised, that no question concerning the jurisdiction of the district court over said cause has *alone* been certified to this court is met by the terms of the certificate itself. The lower court, as shown above, in its certificate has said:

"This court does hereby certify and make known unto the Supreme Court of the United States that the *only question* arising upon said appeal is the question as to

whether or not, under the facts stated in the amended libel and in the exceptions thereto, this court acquired or had jurisdiction to hear or pronounce the said decree."

It would seem, therefore, that no genuine fault can be found with the form of the certificate, nor can it be successfully contended that the court below has assumed to make a broader certificate to this court than authorized by the statute above quoted. It is stated in the original brief that the last two questions discussed therein may not be considered jurisdictional questions. The argument upon the appeals must not, however, be confounded with the appeals themselves, nor with the certificate of the question to be decided. It appears plainly, from the undisputed facts certified, that the only question certified is whether the contracts alleged in the amended libels are maritime contracts. The last two questions were discussed, as stated in the brief, because there are conflicting decisions of the federal courts upon the points, and it was thought, in the interest of harmony of decision, they should be finally determined by the court of last resort. The appeals have been properly taken, and the jurisdictional question has been duly certified. The validity of the appeals cannot be affected by any argument made extending to questions which may not be considered jurisdictional ones. The argument will not be considered.

Respectfully submitted,

WILLIAM T. MUIR,
Of Proctors for Claimants.

JOHN W. WHALLEY and
WILLIAM T. MUIR,
Proctors for Claimants.

Portland, Or., Oct. 23, 1897.